

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 01Nov2002

CASE NO.: 2002-LHC-938

OWCP NO.: 15-45582

In the Matter of

**DARLETTE MAUMAU (Widow of
Finif Fuiaki Maumau),
SHELLY DAGGETT (Mother of
Salesi and Maika Maumau)**
Claimant

v.

JOHN M. MANNERING
Employer

HEALY TIBBITTS BUILDERS
Employer

and

HAWAII EMPLOYER'S MUTUAL INSURANCE COMPANY
Carrier

Appearances:

Preston Easley, Esquire, San Pedro, California,
for Darlette Maumau

Steven Birnbaum, Esquire, San Francisco,
California, for Shelly Daggett

Paul Schraff, Esquire and Valeri Cotto, Esquire
(Dwyer, Schraff, Meyer, Jossem & Bushnell),
Honolulu, Hawaii, for John M. Mannering
Christopher Field, Esquire (Field, Womack & Kawczynski),
South Amboy, New Jersey, for Healy Tibbitts Builders

Robert C. Kessner, Esquire (Kessner, Duce, Umebayashi,
Bain & Matsunage), Honolulu, Hawaii, for the Carrier

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

On August 16, 2001, Finif Fuiaki Maumau (the Decedent) was fatally injured while working for John M. Mannering (Mannering), a subcontractor of Healy Tibbitts Builders (Healy Tibbitts), on a construction project to improve berthing wharves for submarines at the United States Naval Submarine Base in Pearl Harbor, Hawaii. Thereafter, Darlette Maumau (Claimant Maumau), the Decedent's and Shelly Daggett (Claimant Daggett), mother of the Decedent's minor children, Salesi Maumau and Maika Maumau, filed claims for survivor's benefits against the Mannering and Healy Tibbitts under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (the Act).

After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs (OWCP), the matter was referred to the Office of Administrative Law Judges for a formal hearing which was conducted before me in Honolulu, Hawaii on May 23, 2002. The hearing afforded all parties an opportunity to present evidence and oral argument, and appearances were at the hearing by counsel on behalf of each of the parties.¹ Six witnesses testified at the hearing on behalf of the Claimants, documentary evidence was admitted as Administrative Law Judge's Exhibits ("ALJX") 1-15, Claimant Maumau's Exhibits ("CX") 1-29D, Claimant Daggett's Exhibits ("DX") 1-3, Employer Mannering's Exhibit ("MX") 6, and Employer Healy Tibbitts's Exhibits ("HTB") 7-8. Hearing Transcript ("TR") 9-23.² At the close of the hearing, the record was held open at the parties' request for offers of additional evidence and closing argument. TR 71. Post-hearing briefs were timely filed by counsel on behalf of Mannering and Healy Tibbitts on July 10, 2002 and July 15, 2002, respectively, and the record was then closed.

¹ However, based on a stipulation of the other parties which is discussed, *infra*, counsel for the Carrier, Hawaii Employer's Mutual Insurance Company, withdrew his offer of documentary evidence and stated that he would not be formally participating in the proceeding, although he remained to observe the hearing. Hearing Transcript at 10-11.

² Counsel for Healy Tibbitts objected to Claimant Maumau's offer of CX 6, the Memorandum of Informal Conference, on the ground that the formal hearing before me was *de novo*, but he agreed to admission of this document for the limited purpose of establishing the Claimants' entitlement to attorney's fees. TR 17-19. The parties also stipulated that the date of the informal conference was December 19, 2001. TR 18.

After careful analysis of the evidence contained in the record, I conclude that the Decedent was engaged in maritime employment covered by the Act at the time of his death. Consequently, I conclude that Claimant Maumau is entitled to widow's benefits based on an average weekly wage of \$1,166.73 and funeral expenses and that Claimant Daggett is entitled to survivor's benefits on behalf of the Decedent's two minor children based on the same average weekly wage of \$1,166.73. Furthermore, I conclude that Healy Tibbitts is responsible for all compensation and expenses due under the Act because its subcontractor, Mannering, failed to provide longshore coverage to the Decedent on the date of his fatal accident. My findings of fact and conclusions of law are set forth below.

II. Background

The berthing wharves at the U.S. Naval Base in Pearl Harbor are concrete piers or decks, supported by pilings and extending from the shore over navigable waters, which are used to accommodate submarines and other ocean-going vessels while they are in port. Prior to the construction project involved in this case, the wharves were equipped with utilities, including electrical power, for the use of the submarines, and the concrete deck was approximately 28 feet deep, as measured from the land to the water's edge where the submarines tie up. The construction project consisted of replacing the existing 28 foot deck with a new 50 foot concrete deck. This was accomplished by setting new pilings into the ground on the landward side of the existing concrete deck, after which the old deck would be demolished and replaced with the new 50 foot concrete deck. The soil into which the new pilings had been driven would then be excavated, allowing the water to flow under the deck as it had flowed beneath the predecessor structure. In addition, the electrical lines which supply power to the berthed submarines through a series of concrete-encased "duct banks" which run underground from the land to the manholes on wharf were relocated through new duct banks, and the existing duct banks were demolished. Healy Tibbitts was designated as the general contractor for the project, and Mannering was brought in as a subcontractor to demolish the existing duct banks and manholes, excavate for the new duct banks and manholes, pour concrete over the new duct banks which were installed by another subcontractor, and cover the new duct banks with fill. The Decedent was fatally injured when a steel "trench shield" which is used to support the side walls of an excavated trench fell, pinning him against the existing concrete deck near the point where it joined the land.

III. Stipulations and Issues Presented

The parties offered the following stipulations which I now adopt as my findings:

- (1) for the limited purpose of this U.S. L&H claim, that Mannering did not have U.S. L&H coverage on the date of the Decedent's death on August 16, 2001, provided, however, that this stipulation is not binding on nor a waiver of any claim or defense of any party in any other proceeding, including the presently pending action and claims in the United States District Court for the District of Hawaii;
- (2) the accident and death of the Decedent occurred on August 16, 2001 on a situs that is a maritime situs covered under the provisions of the Act;
- (3) at the time of the accident and death of the Decedent on August 16, 2001, there was in effect an employer/employee relationship between the Decedent and Mannering;
- (4) there was an accident resulting in the death of the Decedent on August 16, 2001;
- (5) the Claimant, Darlette Maumau, is the eligible surviving spouse of the Decedent; and,
- (6) the Claimants, Salesi and Maika Maumau, are the natural children of the Decedent.

TR 10-13. In addition, the parties stipulated that the photograph of the site, which was admitted in evidence as CX 28, was taken on August 1, 2001. TR 15-17. The parties further agreed that the unresolved issues are (1) whether the Decedent was employed as a maritime worker or had maritime status within the meaning of the Act and (2) the applicable average weekly wage. TR 14.

IV. Summary of the Evidence

A total of six witnesses, all called by Claimant Maumau, testified at the hearing. Their testimony and the documentary evidence introduced are summarized below.

A. Testimony of Jeremy W. Pope

Jeremy W. Pope testified that he is employed as a project manager by Garney Morris, Inc., an electrical contracting company. TR 30-31. Mr. Pope further testified that he was working for Garney Morris which was a subcontractor to Healy Tibbitts on the P-123 Berthing Wharves Project at the Pearl Harbor submarine base at the time of the Decedent's fatal accident. TR 31, 34. He stated that the purpose of the job was to replace wharves S-10, 11 and 12 by demolishing

three existing wharves and rebuilding them. TR 31. At the time of the accident, Mr. Pope had been working at the job site for approximately four months out of a trailer which he believed was owned by Healy Tibbitts and which was located a couple hundred feet from the job site. TR 32-33.

Mr. Pope testified that the purpose of the berthing wharves is to provide a facility for submarines to tie up. TR 33-34. He said that Garney Morris's subcontract on the project included installation of new manholes and duct banks for electrical or communication cabling and installing the new utility cables. TR 33-34. He explained that a duct bank is comprised of conduit, a raceway for cable that is encased in concrete. TR 35. He testified that Mannering also worked on the duct banks and that Mannering's employees demolished the old duct banks in several locations. TR 34. Referring to the project site plans in evidence as exhibits CX 29-B and CX 29-C, Mr. Pope testified that the duct banks demolished by Mannering's employees were approximately 40 feet from the water at their closest point. TR 35-37.

Mr. Pope testified that Mannering also performed the excavation work for new electrical duct banks on the job site. TR 43-44. Mr. Pope testified that Garney Morris then installed electrical cable into the duct banks excavated by Mannering. TR 45. He further testified that there are shore power mounds located on the berthing wharves which will be fed from substations and that electrical cables from the substations will go through secondary feeders to be installed in the duct banks. TR 48. He explained that these secondary feeders will eventually feed the shore power mounds which he described as "boxes that contain large receptacles that ships can come up to and plug into and power ships so that they don't have to run the ships while they're in berth." TR 49. He stated that the secondary feeders run through the duct banks excavated by Mannering will also provide power for lighting and fire alarms on the three submarine berths. TR 49-50, 55. He stated that the concrete extension of the pier deck will extend farther inland when the job is completed and that it will cover the duct bank excavation work done by Mannering. TR 50-51.

Sam Mataele, the Mannering foreman, was Mr. Pope's contact point on the berthing wharf project. TR 55-56. A portion of Mr. Pope's daily routine was to observe how much trench had been dug by Mannering in order to see how much conduit could be installed. TR 56. Mr. Pope testified that he was somewhat familiar with the Decedent's work activities, and he said that he had seen the Decedent in and around the trenches, working with someone on an excavator to dig the trenches and helping with pouring the concrete which encased the electrical conduit installed in the duct banks. TR 58, 62-63. He testified that the main duct bank trench excavated by Mannering began at manhole J-81 and ended at J-78, running parallel to the edge of the wharf at a distance of approximately 75 feet from the water's edge, while other trenches dug by Mannering were perpendicular to the main trench on the land side and ran farther away from the water's edge. TR 59. He also stated that Mannering did some trench excavation at J-81, an existing manhole, which is approximately 30 to 40 feet from the water's edge. TR 59-60.

Mr. Pope testified that he was eating lunch on August 16, 2001 when the accident occurred and that the Decedent was still on the project site when he returned from lunch. TR 39. He stated that the Decedent was lying on his back on the dirt to the side of the old concrete wharf deck and that the trench shield was sitting on the deck, closer to the water. TR 41-42.

On cross-examination, Mr. Pope testified that the shore power mounds will provide electricity to berthed ships or submarines, pier lighting, a fire alarm, and some industrial outlets to plug in small hand tools for work being done on the submarines. TR 66. He said that he was not aware that the electrical service would be used for loading and unloading the ship. TR 66. He described the shore power mound as a stainless steel enclosure with large, 480-volt receptacles, similar to an outlet for a light, to plug in the ships or submarines to provide power while they are in berth. TR 66-67. He testified that the power from the shore power mounds would aid the ship in berth, but was not necessary because, on occasion, when ships come in and they cannot receive power for some reason, they can remain on their own power. TR 67. However, he testified that the trenches excavated by Mannering for the duct banks were necessary to supply electric power the shore power mounds, and he stated that trenches would also be used to install conduits for telecommunications by another company for future telephone and cable television use. TR 67-68.

Mr. Pope further testified on cross-examination that duct banks on the berthing wharf job were constructed in using standard techniques and that the work would have been done in the same manner even if it was miles from the water and in a non-maritime setting. TR 76. He stated that there was nothing unique about the cement or concrete, how it was used, or how the soil was used to cover the concrete. TR 77. Finally, he stated that he never saw the Decedent repair, build, break or take apart a ship, work on or over water, or load or unload any kind of vessel on the water, but he considered the work a pier project. TR 78-79.

B. Testimony of Maika Mataele

Maika Mataele testified that he had been employed by Mannering for about four months and was working on the P-123 Berthing Wharves Project at the time of the accident on August 16, 2001. TR 80-81. He identified the Decedent as one of his co-workers and said the Mannering work on the project done primarily by three employees, Sam Mataele, the Decedent and himself. TR 81. Sam Mataele is his brother, and the Decedent was his first cousin. TR 81. He further testified that their primary duty was to excavate, shore, and prepare a trench for Garney Morris to install electrical duct bank. TR 81. He said that all three Mannering employees, including the Decedent, operated the backhoe and an excavator in order to dig trenches and various other duties. TR 81-82. In addition, the Mannering employees poured concrete for the new duct banks and demolished the old duct banks. TR 82. Mr. Mataele testified that he handled the paperwork and that the employees chose Sam Mataele as the foreman because of his seniority. TR 82-83.

Mr. Mataele testified that on the day of the accident, the Mannering employees were starting to excavate from the main electrical line to a trunk in order to tie into manhole J-34 so that Garney Morris could install conduit. TR 83. Immediately prior to the accident, they had picked up the trench shield in order to disassemble the device. TR 83. Referring to a photograph of the project site, CX 7, Mr. Mataele identified the trench shield and stated that he believed that was the location of the trench shield at the time of the accident. TR 83-84. He testified that the accident occurred as he was walking away from the trench shield to get a ladder which was about 20 or 30 feet away when he heard a noise, turned and saw the trench shield falling down on the Decedent. TR 84. He stated that Sam Mataele used the excavator to lift the top half of the shield, and he pulled the Decedent out onto the soil inland of the trench shield and the edge of the wharf deck. TR 85-87. Mr. Mataele testified that a photograph of the project site, CX 7, depicts the exact location of the trench shield when the Decedent was killed. TR 85-86. He estimated that the side of the trench shield closest to the water's edge is approximately 20 feet from the water. TR 86-87.

In addition to the duct bank trench excavation, concrete pouring and backfill duties, Mr. Mataele testified that the Decedent was asked by Healy Tibbitts to use the Mannering backhoe to uncover loose soil around the tops of the new pilings so that Healy Tibbitts could continue its work. TR 88. The piles apparently became covered with loose soil as a result of a combination of Healy Tibbitts's drilling and Mannering's trench excavation work. TR 88. He stated that the backhoe was mostly on the existing concrete wharf deck when the Decedent was clearing the new piling caps which brought him within a couple of feet of the water's edge. TR 89. He recalled that the Decedent had operated the backhoe to clear loose soil from the piling caps approximately ten times and that he had cleared concrete or boulders from these same areas on approximately three other occasions. TR 90-91. This work consumed between one hour and a half day on each occasion and was performed at the request of the Healy Tibbitts superintendent throughout the course of the construction project. TR 91-92. Mr. Mataele stated that piling caps where the Decedent cleared loose soil and debris would eventually be covered by the new concrete wharf deck. TR 92.

Mr. Mataele testified that the Decedent went aboard a floating crane barge, which was used by Healy Tibbitts on the berthing wharf project, on a few occasions to borrow an acetylene torch and hand tools to assist in the demolition of steel reinforcing bars. TR 92-95. He stated the Decedent went aboard the barge by stepping across from the wharf to the barge which was tied very close to the pier. TR 98-99. He also stated that the Healy Tibbitts crane on the barge helped Mannering place electrical vaults into excavations that Mannering had dug. TR 95-96, 99. He explained that there were six vaults with two being placed in each excavation. TR 96. He stated that this process lasted one day for each vault excavation and occurred over a period of four months. TR 96-97. He further stated that a Healy Tibbitts employee would direct the crane operator with hand signals and that the Mannering employees would assist in placing the vault into the excavation. TR 97. Mr. Mataele explained that the vaults are different from the shore power mounds in that they are electrical vaults that are installed underground and connected to the trenches dug by Mannering. TR 98. He also testified that he and the Decedent would go on

the barge to consult with the mechanic when necessary, but that this did not happen with any kind of regularity. TR 97-98.

On cross-examination, Mr. Mataele testified that Mannering had finished using the trench shield just prior to the accident and were preparing to send it back to the place from which it had been rented. TR 100-101. He said that the Decedent probably went onto the Healy Tibbitts floating crane barge during the first month of the project when Mannering was doing the demolition work. TR 102-103. He testified that this demolition work was performed with an hydraulic hammer that breaks up the concrete. TR 103. He stated the concrete contained steel reinforcing bars and it was necessary to use an acetylene torch to cut through reinforcing bars around manholes. Mr. Mataele testified that Mannering probably used the Healy Tibbitts acetylene torch three times. TR 104. He explained that the Healy Tibbitts crane operator actually moved the acetylene torch apparatus from the barge to the wharf and that the only item that the Decedent actually carried off of the barge was a “striker” used to light the torch. TR 105. Mr. Mataele stated that Mannering did not own any torches even though they were contracted to demolish rebar structures because they are a small company and because Healy Tibbitts was willing to make its equipment available. TR 106.

Mr. Mataele testified that he never observed the Decedent repair, build, tear apart or break down any kind of vessel. TR 106-107. He stated that, apart from carrying the striker off the crane barge three or more times, he never saw the Decedent participate in any loading or unloading activities of any vessel, including the crane barge. TR 107.

On redirect examination, Mr. Mataele testified that the crane on the barge was used to offload the vaults from a truck that delivered them. TR 108. He stated that, during this process, the Mannering employees, including the Decedent, assisted in directing the crane operator and unrigging the chains or hooks from the vaults. TR 108. He clarified his previous testimony that this process took from a half day to almost the entire day on three different days. TR 108-109. He continued that the cranes would set the vaults into the excavated area. TR 109. He described the concrete vaults as square, two-piece vaults. TR 109.

On recross examination, Mr. Mataele testified that the crane was used to install the vaults because they were heavy. TR 109-110. He further testified that Garney Morris and Healy Tibbitts scheduled and directed the vault-setting process after Mannering indicated that the excavation was ready. TR 110. He stated the vaults were supplied by Garney Morris and that Mannering’s responsibility was to ensure that the excavation was level before installation. TR 111. Mr. Mataele provided the following description of Mannering’s role in the vault-setting process:

Q. And you were there to make sure that the dirt was level for the vault to be installed by Garney Morris?

- A. That the rock was leveled because it was in water, and we couldn't see anything. We had our equipment there so once the vault had been placed, we – actually, I think Fini [the Decedent] and I were in water unhooking the rope. Because he was a bigger person, he could reach down lower on the first one, and then the second one I did. You almost had to dive in just to unhook the rigging. Nobody else wanted to do that, get wet.

TR 111-112. He stated that the vault excavations were ten feet deep and that the water in the excavation was salt water which was encountered at a depth of six to eight feet. TR 112.

After hearing the testimony of the other witnesses, I recalled Maika Mataele for further examination. TR 177. Mr. Mataele testified that he is currently employed by IMC, Island Mechanical. TR 178. He continued that he left Mannering shortly after the berthing wharves job was completed and returned to a union job in California that he had left to take the Mannering job. TR 178. He further testified that Mannering did not have any additional work for him after the Pearl Harbor job was completed and that Mannering's bids on other work were not successful. TR 179. He stated that Mannering did not lay him off, but he moved back to California because Mannering did not have any work and his wife, who was living in California, had been laid off. TR 179-180.

On redirect examination, Mr. Mataele testified that the Decedent had intended to further his involvement with the operating engineers' union in terms of operating cranes. TR 180. He added that the Decedent enjoyed operating cranes, and he believed that the Decedent was a certified crane operator for his former employer, Okada Trucking, but Okada could not get him into the operating engineers' union. TR 180. He further testified that Mr. Okada was the Decedent's godfather and that there had been some conflict with the Decedent operating cranes for Okada on non-federal work in violation of the union's collective bargaining agreement. TR 181. Mr. Mataele also said that the three Mannering employees were also exploring landscaping work at Kanioli Marine Corps Air Station either through Mannering or on their own. TR 181. He continued that the three employees bid on a job as operators from Local 3 at the Kanioli Marine Corps Air Station and that it was his understanding from his brother Sam that the Air Station stated that the job had not come up yet. TR 181-182. Mr. Mataele agreed that the Decedent was "a very skilled man." TR 182. He knew that the Decedent operated a 90-ton crane at Okada and stated that workers with this skill were "very much" in demand. TR 183. He added that the Decedent could operate hydraulic equipment, backhoes, excavators and just about any piece of construction equipment. TR 183. As an experienced operating engineer, Mr. Mataele stated that a reliable person with these skills, like the Decedent, would be in great demand after joining the operating engineer's union. TR 184. He further stated that the union did not restrict the Decedent to work in Hawaii and that he had offered to take the Decedent to San Francisco where he had worked as a foreman for Reese Engineering, a large company. TR 184. He further testified that the Decedent had been intending to take the job offer from Mr. Okada or with the Mannering employees, and he stated that he considered the Okada offer to the Decedent to be firm. TR 185.

On cross-examination, Mr. Mataele testified that he is a foreman for Island Mechanical on their concrete side which is a non-union operation. TR 185. He acknowledged that his present job did not pay as well as operating engineer work, and he explained that he was “just kind of doing that as a way of breaking off with my own company.” TR 186. He continued that, even though he is still a member of the union, he had chosen not to do that type of work in Hawaii since the Mannering job because he can find other work. TR 186. Mr. Mataele further testified that no other contracts were awarded to Mannering, but they were in the process of seeking work. TR 187. He testified that he became aware of the longshore coverage problem for Mannering after he left for California in October 2001, and that he first learned that Healy Tibbitts had sued Mannering at the hearing. TR 188-189. He stated that the Kanioli Marine Air Station job involved dredging work which would require equipment. TR 189-190. He further stated that the Decedent had told him that he had a standing job offer with Okada whether or not he was in the union. TR 190. He did not recall when the Decedent had last worked for Okada but said that he had last seen Decedent on a crane for Okada in 1993 or 1994 and for another employer in 1998 or 1999. TR 191. He stated that the Decedent’s joining the union would have been advantageous because he could have worked at any of Okada’s job sites. TR 191. Mr. Mataele stated that the union members are given work from a numerical list of names compiled by date entered, unless a company requests a particular individual. TR 192-193. He stated that the Decedent was still in the union’s one-year probation period at the time of the accident, and he said that the Decedent was fulfilling his requirements and has his dues current at the time of his death. TR 193. Mr. Mataele testified that he believed Radian was formerly known as Davis & Moore and is a company owned by friends of his that has done underground work, though he did not know if Radian was still in business. TR 194.

Lastly, Mr. Mataele testified that he was a member of the operating engineers’ local in California and that his brother Sam had helped the Decedent get into the operating engineers’ union in Honolulu. TR 195. He added that Sam first became a member in California, subsequently left the union, and then became a member again in Honolulu. TR 195.

C. Testimony of Richard A. Heltzel

Richard A. Heltzel testified that he is the president of Healy Tibbitts Builders and has been president for approximately two years. TR 118. Prior to becoming president, he was vice president for about nine years. TR 118-119. He stated that Healy Tibbitts was the general contractor for the P-123 Berthing Wharves Project, which is a Navy contract to refurbish or replace three existing berthing wharves at the submarine base in Pearl Harbor. TR 119. He continued that Healy Tibbitts hired Mannering as a subcontractor to assist with the demolition and construction of the three berthing wharves. TR 119. He stated that Mannering’s work was essential to the completion of a part of the contract. TR 120. He identified exhibit CX 16 as the subcontract agreement between Healy Tibbitts and Mannering dated November 21, 2000, and he characterized the subcontract as an agreement to assist the electrical subcontractor in the installation of electrical and telephone communication duct banks, which was a part of the overall berthing wharves construction project. TR 120-121. He stated that the contract, which was

awarded in June 2000 and is scheduled for completion in late November 2002, calls for the demolition of three existing wharves that are used for periodically berthing submarines and other vessels, and construction of new berthing wharves which will extend approximately 20 feet further inland than the existing wharf and which will also be used by submarines. TR 121-122, 127. Mr. Hetzel described the wharf as "a pile supported structure" which is constructed of reinforced concrete. TR 122-123. He testified that the new wharf structure will consist of an exposed concrete surface with water underneath. TR 124. He stated that part of Healy Tibbitts's job was to driving new pilings which, except for the back row, will be exposed to water at the project's completion when an excavator will remove the soil beneath the new wharf deck. TR 125-126. Mr. Hetzel testified that the majority of the trenches excavated by Mannering were between 60 and 70 feet from the water's edge, though they were closer by about 15 to 20 feet where the trenches tied into existing manholes. TR 126-127. He also stated that at the project's completion, the trenches excavated by Mannering would be landward of the inner-most water's edge. TR 127.

Mr. Hetzel further testified that he signed a letter dated December 7, 2000 from Healy Tibbitts to Mannering which states that its workers' compensation policy must include U.S. Longshore and Harbor Workers' coverage. TR 117-118; CX 27. He explained that he sent the letter because Healy Tibbitts has a corporate policy that all subcontractors must provide U.S. Longshore and Harbor Workers' coverage for jobs that are on or near the water. TR 118. He acknowledged that the P-123 Berthing Wharves Project fell into the category of waterfront-type work. TR 118.

On cross-examination, Mr. Heltzel testified that he was not aware of any writing to Mannering that prohibited the subcontractor from doing work over the water, loading or unloading ships, or using the facilities of the offshore crane barge. TR 129-130. He further testified that he never told Mannering not to refrain from any of these activities. TR 130, 133. He was not sure who formulated Healy Tibbitts's longshore coverage policy and stated that he did not have a voice in the policy. TR 130. He added that he could always provide an opinion on the policy though, but did not in this case. TR 130. He believed all of Healy Tibbitts's subcontractors in 2001 were required to provide longshore coverage because most of the firm's work was performed on the waterfront. TR 131. He also stated that Healy Tibbitts job sites are generally confined by a fence and that Healy Tibbitts requires all subcontractor employees on a waterfront job to wear a flotation device. TR 132. He said that the berthing wharf project site at Pearl Harbor initially contained a roadway, and the site fence was erected landward of this roadway. TR 132. Mr. Hetzel had no knowledge that Healy Tibbitts ever prohibited Mannering employees from going on barges at the job site or using the floating crane to aid their work. TR 133. He testified that there was no written agreement that Healy Tibbitts was solely responsible for setting the vaults with the barge crane. TR 133. He did not recall any specific encouragement that Mannering assist with this task, but he agreed that it was Healy Tibbitts' normal business practice to encourage full cooperation among all the parties to set the vaults. TR 134.

On cross-examination, Mr. Heltzel testified that Mannering's subcontract did not include excavating below the new wharf deck to enable the water to pass underneath, and he had no knowledge that Mannering employees ever participated in that activity. TR 135. He stated that Mannering worked for approximately one month at the site after the Decedent's accident on August 16, 2001. TR 135. He said that Mannering completed about 95 percent of the work under its subcontract, and there was no expectation that Mannering would return to the site for any additional subcontract work. TR 135-136. Healy Tibbitts had not hired Mannering as a subcontractor prior to the berthing wharves project and has not employed Mannering since that project. TR 136. He testified that, by contract, Garney Morris was responsible for supplying the vaults, Healy Tibbitts was responsible for setting the vaults, and Mannering was to perform the excavation, place the bedding rock on which the vaults would rest, and eventually back-fill around the vaults. TR 137.

On redirect examination, Mr. Heltzel testified that Healy Tibbitts has brought a civil lawsuit against Mannering and has no current business relationship with Mannering. TR 137. He said that the relationship between the companies has changed since the accident, though Mannering was allowed to continue working after the accident. TR 138. He further stated that Mannering employees were not moved away from the water's edge after the accident. TR 139.

D. Testimony of John M. Mannering

John M. Mannering testified that he is a sole proprietor and that he was the Decedent's employer at the time of his fatal accident on August 16, 2001. TR 141. He further testified that the Decedent's job title at the time of the accident was operator, meaning a machine operator, and that he was one of three Mannering employees performing excavation and concrete work at the Pearl Harbor Naval Submarine Base. TR 141-142. Mr. Mannering stated his employees continued to work at the accident site after the accident, and the nature of the work did not change. TR 143. He confirmed that Healy Tibbitts has not contacted Mannering for any future jobs. TR 143. He also stated that he believed Healy Tibbitts was suing him and said that he had no idea whether Healy Tibbitts would contact him for work in the future. TR 143. He stated that his employees also cut down trees on the edge of the excavation area for Healy Tibbitts. TR 142-143; CX 16.

On cross-examination, Mr. Mannering testified that his employees performed demolition of existing material that was in the way of the excavation work. TR 144. He stated that the Mannering employees assisted in setting the vaults by excavating the holes and ensuring that the beds were level. TR 144. He further stated that the contract did not include rigging to move the vaults, directing the crane operator in setting the vaults, or disconnecting the rigging once the vaults were in place. TR 145.

Mr. Mannering further testified that he had not employed the Decedent prior to the berthing wharves project and had not promised him employment after that job was completed. TR 145. He stated that his firm's work on the berthing wharves project started in May 2001 and

continued for about a month after the Decedent's accident, and that he had no contracts to do similar work either at the start of the berthing wharves project or at the time of the accident on August 16, 2001. TR 145-146. He agreed that he had never seen the Decedent repair, build, break apart, or load or unload any vessel. TR 146. He also never saw the Decedent perform any of his work duties on the water. TR 146.

On redirect examination, Mr. Mannering testified that the berthing wharves project was a union job and that his employees, including the Decedent, were required to join the operating engineers' union in order to work on the job. TR 147. He stated that the Decedent could have gone to the union at the completion of the project to seek other jobs. TR 148. Mr. Mannering testified that the Decedent had never been disciplined while working for his firm, and there was no reason he would not have rehired the Decedent for future similar work. TR 148-149. He stated that he intended to continue his business after completion of the berthing wharves project if he had been awarded more contracts and that he would accept additional work if offered by Healy Tibbitts. TR 149.

E. Testimony of Kevin J. Vanden Heuvel

Kevin J. Vanden Heuvel testified that he had been employed by Healy Tibbitts as the quality control manager for a year and seven months as of August 16, 2001, and he was still working as the quality control manager for the P-123 Berthing Wharves Project at the time of the hearing. TR 151-152. He stated that he visited the job site on a daily basis at the time of the accident and maintained an office in a trailer outside the job site. TR 152. He testified that the accident occurred in the CR-10 berth area of the job site. TR 152. He said that he observed the Decedent working at the site daily when Mannering was on the job. TR 152. He observed the Decedent performing excavation work as part of Mannering's subcontract and excavating loose dirt around pilings with a small backhoe, but he did not recall ever seeing the Decedent use the backhoe on the concrete wharf deck, stating that he had observed the Decedent on the backhoe about 15 to 20 feet away from the landward edge the existing wharf structure. TR 153. He stated that the pilings cleared by the Decedent were located 40 to 50 feet from the water's edge and that the Decedent had been asked by Chuck Lauder, a Healy Tibbitts project manager, to perform this work. TR 153. Consistent with the testimony of the other witnesses, Mr. Vanden Heuvel testified that water will flow under the new wharf structure where these pilings were driven after the land underneath was excavated and the new deck constructed over the pilings. TR 154.

Mr. Vanden Heuvel also testified that he observed the Decedent pour concrete for the new electrical ducts and demolish the old ducts which were often in a different location than the new ducts. TR 154-155. He stated that the old ducts ran perpendicular to and between 30 and 50 feet from the wharf face. TR 155. He further stated that the new duct bank ran parallel to the wharf, about 75 feet from the wharf face and curving at each end to within 40 feet of the face. TR 155. He agreed that the project basically involved demolishing an old wharf with a 28-foot wide concrete deck and building a new wharf with a 50-foot wide concrete deck. TR 156. He stated

that the old wharf deck was still in place at the time of the accident. TR 156. He further testified that he had seen the Decedent working within 50 feet of the wharf face and he confirmed that when the project is completed, new electrical cables will run through the duct banks built by Mannering from the electrical substation to the shore power mounds on the wharf. TR 157.

Mr. Vanden Heuvel testified on cross-examination that land was excavated under the old wharf in order to widen the wharf. TR 158. He explained that the wharf deck is entirely supported on pilings and that the land is excavated to facilitate installing the piles. TR 158. He testified that the Decedent removed loose dirt from around the piles to allow Healy Tibbitts to cut the pile tops to the correct elevation in preparation for the new wharf deck to be built on top of the piles. TR 159. He said that the Decedent removed soil that had been placed around the piles from the excavation of the trench. TR 160. On redirect examination, Mr. Vanden Heuvel testified that Healy Tibbitts used an auger to drill for the piles and that "cuttings" came up from the auger. TR 160. He stated some of the soil cleared by the Decedent might have been auger cuttings in addition to soil from the excavated trench with the majority of the cleared soil coming the trench excavation. TR 160-161.

F. Testimony of Darlette K. Maumau

Darlette K. Maumau identified exhibit CX 10 as a true copy of her marriage certificate to the Decedent, and she testified that they were married on February 13, 1992 and remained married until the time of his death. TR 162. She identified exhibit CX 11 as a true copy of the Decedent's death certificate which she obtained from the Braithwaite Mortuary. TR 162-163. She identified exhibit CX 18 as a true copy of his funeral bills from Wardenstein's Hawaiian Memorial Park and Hawaiian Memorial Park Cemetery, totaling between \$8,000 and \$9,000, which were paid by her mother on condition that she would be reimbursed. TR 163. She added that she is ultimately responsible for the funeral bills. TR 163-164. She also identified exhibit CX 13 as a true copy of the Decedent's treatment records from Tripler Army Hospital, which is where he was taken following the accident, exhibit CX 14 as a true copy of the police report pertaining to the accident that she obtained directly from the police, and exhibit CX 12 as a true copy of the Decedent's autopsy report. TR 162, 168-169.

Ms. Maumau also identified exhibit CX 17 as a true copy of the Decedent's W-2, reflecting that he earned \$17,501.76 from Mannering in 2001, and pay stubs from his employment at Mannering. TR 164. She testified that the Decedent worked for 15 weeks preceding August 16, 2001 exclusively at the Pearl Harbor Submarine Base. TR 164. She further testified that the Decedent was self-employed, building rock and tile walls, in the 52 weeks preceding August 16, 2001 before he went to work for Mannering, and he had negative earnings of about \$1,815.00 for the year 2000 and similar earnings in 2001. TR 164-165.

Ms. Maumau testified that the Decedent had joined the operating engineers' union when he went to work for Mannering and that he expected lengthy employment at Mannering because he told her it was a stable company with a lot of available jobs. TR 165-166. She stated that the

Decedent had told her that he had “lots of offers” with companies other than Mannering because of the union. TR 167. She further stated that the Decedent did not have any other maritime employment in the 52 weeks preceding the accident nor was any of his other work near the water. TR 167. Ms. Maumau also testified that Okada, a former employer, had told the Decedent that he could have a job if he got into the operating engineers’ union and that Radian, another former employer for which he had dug sewer lines, also told him that joining the union would make it easier for them to hire him. TR 173.

On cross-examination, Ms. Maumau testified that Radian is still in business and that the Decedent received the job offer from Radian in January 2001 before he joined the union. TR 174. She testified that the Decedent told her that he had another job offer at the Kanioli Marine Base after the Pearl Harbor Submarine Base job ended. TR 175. She stated that she never spoke to anyone else about the Decedent’s employment prospects after the Pearl Harbor job, and she had no knowledge of a specific job offer, though she testified that the Decedent told her that Mannering and the operating engineers’ union represented long-term work. TR 175-177. She also stated that he had opportunities to work for the union with the bus company or the operating engineers’ union with Mannering, and that he had chosen to work for Mannering through the operating engineers’ union. TR 176.

G. Deposition of Darlette Maumau³

Healy Tibbitts offered the deposition of the Claimant Darlette Maumau, which was taken on May 2, 2002. HTB 8. In the deposition, Ms. Maumau testified that the Decedent worked for Okada Trucking between the time that they were married in 1992 until 1995 or 1996 when he was either laid off or quit due to lack of work. HTB 8 at 12-13. She added that around the time that he left Okada, the Decedent obtained a contractor’s license in order to start his own business. *Id.* at 13. She continued that he never worked for Okada Trucking again after 1996. *Id.* She further testified that the Decedent worked for Radian for a few months in 1999, performing sewer line replacement. *Id.*

Ms. Maumau testified that the Decedent earned his living as a contractor after he left Okada Trucking, except for the period of time with Radian. *Id.* at 14. She stated that his business involved building rock walls, installing driveways, performing demolition, grading land, backfilling, hauling, and other work around residential housing. *Id.* She testified that the Decedent was a licensed contractor and that the business name was Oahu Masonry Contractors. *Id.* at 14-15. She described his work as a contractor as “steady” and stated that he worked six or seven days a week. *Id.* at 15. She further testified that the Decedent received unemployment for about six months in 2000 after he worked for Radian because of a slow economy. *Id.* at 15-16. She said that business picked up again after he stopped receiving unemployment, describing his

³ I have included a summary of Ms. Maumau’s deposition testimony because it provides additional evidence of the Decedent’s employment history and prospects, which is relevant to the issue of the applicable average weekly wage.

business as “steady” but not “busy.” *Id.* at 16-17. She added that the Decedent decided to work for Mannering because the job was stable and because he was going older, telling her that it was long-term job with a good salary. *Id.* at 17.

Ms. Maumau testified that she has been employed as a front desk supervisor for the Princess Kaiulani Hotel for thirteen years, earning \$32,000 annually with no overtime. *Id.* at 17-18. She stated that she has been a front desk supervisor for seven or eight years and has received regular salary increases. *Id.* at 18. Ms. Maumau testified that, looking at her joint federal income tax return for 1997 (HTB 7), the \$31,961 figure probably represents her income and the loss of \$12,204 probably was the Decedent’s business loss. *Id.* at 19-20. She was not sure if the Decedent’s business ever reported a profit to the IRS because he did the taxes. *Id.* at 20. She stated that they had no other sources of income other than earnings. *Id.* Referring to the 1998 income tax return, she testified that the \$32,597 figure probably represented her income and \$14,592 represented the Decedent’s business loss. *Id.* at 20-21. Referring to the 1999 tax return, Ms. Maumau testified that the \$53,874 figure for wages represented her income and that of the Decedent while he was employed by Radian and she noted that the return also reported a business loss of \$6,000.49. *Id.* at 21. She added that the \$2,715 figure for rental estate rental loss related to a tenant who never paid her rent. *Id.* at 21. Referring to the 2000 tax return, she stated that the \$35,927 figure represented her earnings, the \$814 figure was the business loss, and the \$9,646 figure was the unemployment compensation received by the Decedent that year. *Id.* at 21-22.

I. Documentary Evidence

The record includes a copy of the subcontract between Healy Tibbitts and Mannering on the berthing wharves project. The subcontract, dated November 21, 2000, calls for Mannering to perform “Work Items” shown on Schedule “A” for the construction of the P-123 Berthing Wharves at the Naval Station, Pearl Harbor, Oahu, Hawaii. CX 16. The “Work Items” in Schedule “A” are defined as follows:

1. John Mannering shall provide all labor, equipment and materials to complete the listed civil/site work for the P-123 Berthing Wharves Project:
 - a. Demolition of existing electrical duct banks and manholes per the attached Garney Morris facsimile dated 6/20/00.
 - b. Excavate for installation of all new electrical and communication duct banks and manholes.
 - c. Furnish and install concrete for all duct banks after ducts and rebar are installed by others.
 - d. Backfill and compact over and around all ductbanks and manholes and restore surfaces for all ductbanks and manholes. HTBI will provide final AC paving.

Id. at 4. The record also contains copies of joint U.S. Individual Income Tax Returns for years 1997-2000 for the Decedent and Darlette Maumau. HTB 7. The 1997 return shows that the couple reported \$31,960.01 in wages, salaries, and tips, a business loss of \$12,204.00, a loss of rental real estate, royalties, partnerships, S corporations, trusts of \$3,870.00. Explanatory schedules for this return are not a part of the exhibit. The 1997 return lists the Decedent's occupation was contractor. In 1998, the Maumaus reported \$32,597.00 in wages, salaries and tips, a business loss of \$14,592.00, and a loss of rental real estate, royalties, partnerships, S corporations, trusts of \$13,215.00, with a corresponding W-2 form for Darlette Maumau showing that she earned \$32,597.15 in 1998. In 1999, the Maumaus reported \$53,874.00 in wages, salaries, and tips, a business loss of \$6,049.00, a loss of rental real estate, royalties, partnerships, S corporations, trusts of \$2,715.00. The schedules and W-2 forms for this return are not a part of the exhibit. In 2000, the Maumaus reported \$35,927.00 in wages, salaries, and tips, a business loss of \$814.00, and \$9,646 in unemployment compensation. Wage records for the Decedent show that he earned \$17,501.76 during the year 2001. CX 17.

V. Findings of Fact and Conclusions of Law

A. Coverage of the Act

Since the enactment of the 1972 amendments to the Act, the question of whether an injured employee's claim for benefits is covered generally requires an inquiry into the *situs* of the injury and the *status* of the injured worker. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264-65 (1977) (*Caputo*). An exception to the general requirement that situs and status both be considered arises in cases where a worker is injured on navigable waters in which case the worker is treated as a maritime employee covered by the Act regardless on the nature of his or her work. *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 323-324 (1983). *Perini*, however, is inapplicable in this case since there is no evidence or contention that the Decedent was injured while on navigable waters. Therefore, the Claimants, in order to establish coverage under the Act, must prove (1) that the Decedent's injury occurred on a landward area covered by section 3(a) and (2) that his work was maritime in nature, bringing him within the definition of maritime employee in section 2(3) of the Act.⁴ See *Morrissey v. Kiewit-Atkinson-Kenney*, 36 BRBS 5, 9 (2002). Here, I have found, based on the parties' stipulation, that the berthing wharf

⁴ Section 3(a) of the Act in pertinent part states that "compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a). Section 2(3) of the Act defines a covered employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker" 33 U.S.C. § 902(3).

where the Decedent was killed while at work is a covered situs under the Act. Accordingly, the sole issue to be resolved in determining coverage is whether the Decedent had maritime status under section 2(3).

Claimant Darlette Maumau argues that the Decedent was engaged in maritime employment for Mannering at the time that he sustained a fatal injury on August 16, 2001. ALJX 14 at 3-10. She asserts that the Decedent qualifies for coverage under the status test because he was performing the activities of a “harbor-worker” as interpreted by the Benefits Review Board in a decision with nearly identical facts, *Hawkins v. Reid Associates*, 26 BRBS 8 (1992). She notes that, in *Hawkins*, the Board held that a heavy equipment operator working as a subcontractor employee installing utilities at a submarine repair facility on a naval shipyard was a harbor-worker covered by the Act. The Claimant contends that the Board focused on the purpose of the utility lines, which was to provide cooling for nuclear submarine reactors and steam and water for cleaning, and determined that the worker was engaged in maritime employment. In addition, Maumau relies on other decisions where employees involved in the construction of a shipyard and pier were covered by the Act. *Trotti & Thompson v. Crawford*, 631 F.2d 1214 (5th Cir. 1980) (carpenter involved in new pier construction covered); *Brown & Root v. Joyner*, 607 F.2d 1087 (4th Cir. 1979) (excavation foreman in construction of shipyard covered); *Dantes v. Western Foundation Corp. Assn.*, 10 BRBS 541 (1979) (construction foreman of graving docks for submarines covered). Finally, she argues that so long as the Decedent was engaged at least 1% to 2% of his time in maritime activity, he is a covered employee under the Act. *Lewis v. Sunnen Crane Services, Inc.*, 31 BRBS 34 (1997).

In their post-hearing briefs, Mannering and Healy Tibbitts argue that the Decedent was not engaged in maritime employment and, thus, does not qualify under the status test because his job functions were not essential to the loading and unloading process. As controlling authority, they rely on the decision of the United States Court of Appeals for the Ninth Circuit in *McGray Construction Co. v. Hurston*, 181 F.3d 1008 (9th Cir. 1999) which, they contend, removes the Decedent, a land-based construction laborer, from the Act’s scope of coverage. The Employers assert that, in *Hurston*, the Court held that an injured pile driver engaged in the construction of a pier, a covered situs, was not a covered harbor-worker because the Benefits Review Board’s expansive application of that term to any construction workers was inconsistent with the Supreme Court’s ruling in *Herb’s Welding, Inc. v. Gray*, 470 U.S. 414 (1985). In addition, the Employers cite *Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 989-990 (4th Cir. 1994), in which the United States Court of Appeals for the Fourth Circuit held that construction worker, who was injured while building a new power plant at a shipyard which would eventually use the plant to supply power for building and repairing ships, was not covered by the Act simply because the power plant was located on a covered situs. The Employers thus contend that the authority relied upon by the Claimant is outdated because of the *Prevetire* and *Hurston* holdings that a construction worker on a covered situs is not necessarily a harbor-worker within the meaning of section 2(3).

As the Employers correctly point out, this case arises under the jurisdiction of the Ninth Circuit, and its decisions interpreting the maritime status requirement are controlling authority. In *Hurston*, the court held that a pile driver who was injured while working on the construction of a pier-like structure that was used exclusively to process oil from an offshore well was not a covered employee under the Act. *Hurston*, 181 F.3d at 1010, 1012. The court described the job site as a structure that resembled a pier, but was not used to dock ships. *Id.* at 1010. The court determined that the nature of the pile driver's employment did not differ materially from that of the injured worker in *Herb's Welding*. *Id.* at 1012-1013. In *Herb's Welding*, the Supreme Court held that a welder who built and replaced pipelines and performed general maintenance work on offshore oil drilling platforms was not engaged in maritime employment. 470 U.S. at 416, 427. The Court reasoned that the injured worker "had nothing to do with the loading and unloading process" or the maintenance of equipment used for that purpose. *Id.* at 425. Further, the Court had noted that there was nothing "inherently maritime" about the tasks of building and maintaining pipelines, and it emphasized that offshore oil drilling has no relationship to maritime commerce, describing oil drilling platforms as "artificial islands" that are not like piers, and recognizing that accidents occurring on such offshore platforms have no connection to those occurring on piers. *Id.* at 421-424. In *Hurston*, the Ninth Circuit stated that the requirement of a relationship to the loading and unloading process enunciated in *Herb's Welding* precluded the Board's expansion of the term "harbor-worker" to include a worker engaged in the construction of a pier that not used to dock ships. 181 F.3d at 1013. The Court also noted that the Board's own definition of a harbor worker qualified the term "piers" with the phrase "used in the loading, unloading, repair or construction of ships", and it cited Board decisions that limited the definition of a "harbor-worker" to those construction workers on piers that are used to accommodate vessels. 181 F.3d at 1013 n.33, citing *Rhodes v. Healy Tibbitts Constr. Co.*, 9 BRBS 605, 606, 609 (1979) (denying coverage to injured pile driver who built a pier not designed to dock vessels) and *Laspragata v. Warren George, Inc.*, 21 BRBS 132, 135 (1988) (holding core driller injured while building sewage treatment plant foundation was not covered).

I agree with the Employers that *Hurston* rejected the Board's expansion of the term "harbor-worker" to include a worker engaged in the construction of a pier that was not used to dock ships or for any other traditional maritime purpose.⁵ However, *Hurston* did not mention, and it clearly did not overrule *Hawkins*. Rather, *Hawkins* is entirely consistent with *Hurston* because the worker in that case, like the Decedent in the instant matter, was injured while

⁵ The other decisions issued by the Ninth Circuit interpreting the "status" requirement and cited by the Employers are not relevant to a determination of the nature of the Decedent's employment in this case. See *Alcala v. Director, OWCP*, 141 F.3d 942, 945-946 (9th Cir. 1998) (finding that claimant was "aquaculture worker" excluded from the Act and occasional task of moving fish bins on dock too infrequent to award coverage); *Coloma v. Director, OWCP*, 897 F.2d 394, 400 (9th Cir. 1990) (determining that shipping company cook not essential to the loading and unloading process); *Dorris v. Director, OWCP*, 808 F.2d 1362, 1365 (9th Cir. 1987) (ruling that driver who drove truck to dock for the unloading of containers and between berths was not engaged in "maritime employment").

engaged in the construction of a pier that was used for a traditional maritime purpose, berthing submarines. In my view, the critical, and determinative, difference between *Hurston* and *Herb's Welding* on the one hand and the instant matter on the other lies in the fact that, here, the Decedent was injured while engaged in the construction, or more accurately the improvement or replacement, of berthing wharves that are used to accommodate submarines and other vessels.

Based the testimonial and documentary evidence, which is essentially uncontradicted in all material respects, I find that, at the time of his fatal injury on August 16, 2001, the Decedent was working as a subcontractor employee on a Navy contract, the P-123 Berthing Wharves Project at the Naval Station, Pearl Harbor, to improve or replace three existing berthing wharves. Although it is unclear from the record when the wharves had last been used regularly to dock vessels, there is no question that they had been used in the past for that purpose, TR 121-122, and a photograph of the project site admitted at the hearing, CX 28, shows a current maritime use with a barge tied up to one of the wharves.⁶ Moreover, it is undisputed that upon the Project's completion, the wharves will be used to berth submarines which will be able to run on auxiliary power, supplied by the shore power mounds located on the wharf deck, while are berthed. Healy Tibbitts, the Project's general contractor, subcontracted with the Decedent's employer, Mannering, to demolish existing electrical duct banks on the wharves and assist in the installation of new duct banks through which electricity, as well as telecommunication data, would eventually run from substations to provide power for the shore power mounds, as well as berth lighting, the fire alarm system and small electrical tools. The Decedent worked on the Project for 15 weeks before his accident, and he participated with the other two Mannering employees in performing all of the duties outlined by Mannering's subcontract.⁷

The Employers argue that the Decedent does not qualify for maritime status because his specific duties (*i.e.*, digging trenches, pouring concrete and operating a backhoe, jack hammer and excavator) are not "inherently maritime" in nature and would not be altered at all if they were

⁶ While the parties offered little evidence on the purpose of the barge in the photograph of the site, I find that its presence clearly demonstrates a current maritime use.

⁷ There was also testimony at the hearing regarding tasks performed by the Decedent, which were not directly referenced in the Mannering subcontract. These activities include removing excess dirt and other debris around the tops of pilings being driven by Healy Tibbitts's employees at their request, assisting in the setting of vaults, removing coconut trees, and going onboard a Healy Tibbitts barge to borrow tools, including an acetylene torch, to assist in the demolition work. Because I find that the Decedent was engaged in "maritime employment" based on his overall tasks of demolishing and constructing duct banks on the berthing wharf, which is a uniquely maritime structure, I find that it is unnecessary to determine whether these additional activities themselves qualified the Decedent for coverage under the Act or were merely sporadic or episodic in nature. See *Dorris v. Director, OWCP*, 808 F.2d 1362, 1365 (9th Cir.1987) (truckdriver's occasional maritime duties were too "momentary and episodic" to qualify him for maritime "status").

performed on a non-maritime situs. I agree that there was nothing “inherently maritime” in the Decedent’s specific job tasks, and *Hurston* and *Preventire* instruct that the proximity to “salt air” does not perforce change the legal status of a worker’s job. However, the Employers misstate the proper inquiry, which is whether the injured worker was engaged in the construction of a maritime structure, not whether the worker’s specific job tasks or skills used were inherently maritime in nature. Contrary to the Employer’s assertions, I find that the berthing wharves which have a past, current, and future use to accommodate submarines and other vessels have a clearly maritime purpose which is an “integral or essential part of loading or unloading” a vessel; *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 45-46 (1989); and which is materially distinguishable from *Hurston*’s non-maritime pier and *Preventire*’s non-maritime power plant.⁸ Therefore, I conclude that the Decedent, a worker engaged in the construction and improvement of wharves used to accommodate submarines, qualifies as a “harbor-worker” within the meaning of section 2(3) of the Act.

In its brief, Mannering argues that *Hawkins* is distinguishable because the employer in *Hawkins* was responsible for more involved tasks, including the actual laying of utility lines, plumbing, heating, ventilation, storm drains, piping and steam lines in contrast to Mannering’s contractual responsibilities which were limited to digging trenches and pouring concrete. Mannering Br. at 11-12. I find this argument unpersuasive because there is nothing in the precedent that the proper focus is on the level of an employer’s involvement in the construction process. Rather, the relevant inquiry is whether the injured worker was involved in the construction of an “inherently maritime” structure or facility. Moreover, I find that the nature of the Decedent’s duties were essentially the same as those of the heavy equipment operator in *Hawkins* who dug utility trenches and pulled old pipes.

I also note Healy Tibbitts’s argument that *Hawkins* has no bearing on this matter because *Hawkins* arose in the Fourth Circuit, was never appealed and turned on an interpretation of “harbor-worker” that has been rejected by the Fourth Circuit in *Prevetire* and the Ninth Circuit in

⁸ It is noted that subsequent to *Preventire* and *Hurston*, the Board has held that the term “harbor-worker” in section 2(3) of the Act includes “at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships)” *Moon v. 2001 Tidewater Constr. Co.*, 35 BRBS 151, 152 (2001), quoting *Stewart v. Brown & Root, Inc.*, 7 BRBS 356, 365 (1978), *aff’d sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980). In *Moon*, which arose within the jurisdiction of the Fourth Circuit, the Board acknowledged the *Preventire* restriction of “harbor-worker” to construction workers injured while working on structures that are “inherently maritime” in nature even when the injury occurs on a covered “situs.” 35 BRBS 152-153. Based on *Moon*, I conclude that *Prevetire* does not compel the conclusion that the Decedent should be denied coverage. Indeed, the Board in *Moon*, specifically cited *Hawkins* as an example of a coverage for a construction worker injured while working on an inherently maritime structure. 35 BRBS at 153.

Hurston. Healy Tibbitts Br. at 14. For the reasons discussed above, I disagree that *Hurston* overruled *Hawkins*. Moreover, the Board has recently held, subsequent to *Preventire* and *Hurston*, that the term “harbor-worker” in section 2(3) of the Act includes “at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships)” *Moon v. 2001 Tidewater Constr. Co.*, 35 BRBS 151, 152 (2001), quoting *Stewart v. Brown & Root, Inc.*, 7 BRBS 356, 365 (1978), *aff’d sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980). In *Moon*, which arose within the jurisdiction of the Fourth Circuit, the Board acknowledged the *Preventire* restriction of “harbor-worker” to construction workers injured while working on structures that are “inherently maritime” in nature even when the injury occurs on a covered “situs.” 35 BRBS 152-153. Based on *Moon*, I conclude that *Prevetire* does not compel the conclusion that the Decedent should be denied coverage. Indeed, the Board in *Moon*, specifically cited *Hawkins* as an example of coverage for a construction worker injured while working on an inherently maritime structure. 35 BRBS at 153.

In *Herb’s Welding*, the Supreme Court examined the congressional intent behind the Act’s 1972 coverage amendments and concluded that, “[t]he most important of Congress’ concerns . . . was the desire to extend coverage to longshoreman, harborworkers, and others who were injured while on piers, docks, and other areas customarily used to load and unload ships” 470 U.S. at 420. In view of the fact that the berthing wharfs where the Decedent was injured are customarily used to accommodate submarines and other vessels, I conclude that a non-coverage determination would violate the principle that it is important to recognize, particularly in close cases, that the definition of a maritime employee is to be interpreted liberally in favor of coverage. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977). In conclusion, I find that the Decedent qualified for maritime status as a covered harbor-worker under section 2(3) of the Act because he was fatally injured while engaged in the construction of an inherently maritime structure.

B. Responsible Employer

Section 4 (a) of the Act provides:

Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

33 U.S.C. § 904(a).

At the hearing, the parties stipulated that “for the limited purpose of this U.S. L&H claim, that John M. Mannering did not have U.S. L&H coverage on the date of [the Decedent]’s death on August 16, 2001, provided, however, that this stipulation is not binding on nor a waiver of any claim or defense of any party in any other proceeding, including the presently pending action and claims in the United States District Court for the District of Hawaii.” TR 10. Given this stipulation and section 4(a)’s express language that a contractor is liable where its subcontractor fails to provide longshore coverage, I find that Healy Tibbitts is responsible for all compensation and expenses due under the Act. See *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 940-941 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991); *West v. Kerr-McGee Corp.*, 765 F.2d 526, 530 (5th Cir. 1985).

C. Average Weekly Wage

The Claimant, Darlette Maumau, argues that the Decedent’s average weekly wage should be calculated pursuant to section 10(c) of the Act, amounting to \$1,166.73, which is derived from dividing the Decedent’s total earnings of \$17,501 from his employment with Mannering by the number of weeks he was employed there (15), because this was his only maritime employment during the preceding 52 weeks. TR 24-25; Cl. Darlette Maumau’s Pre-Hearing Stmt at 1-2. In support of her position, Maumau cites *Bonner v. Nat’l Steel & Shipbuilding Co.*, 600 F.2d 1288 (9th Cir. 1979), and argues that an ALJ need not consider non-maritime, pre-shipyard employment in computing the average weekly wage where the worker was injured shortly after becoming employed as a maritime employee. Maumau also relies on *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981), where the Board held that an increased salary earned during a seven to eight-week period more accurately reflected the claimant’s earning potential than the amount he earned during the entire previous year and should be the controlling factor in a section 10(c) calculation of average weekly wage. Finally, at the hearing, Maumau cited *Le v. Sioux City and New Orleans Terminal Corp.*, 18 BRBS 175 (1986) as further support for the promotion principle that where an injury occurs after an increase in pay, the average weekly wage should reflect the higher post-promotion wages.

In its post-hearing brief, Healy Tibbitts agrees that section 10(c) is the appropriate method for determining the Decedent’s average weekly wage, but argues that the average weekly wage should be calculated by adding all the Decedent’s earnings for the year prior to August 16, 2001 and dividing by 52 or, in the alternative, dividing the total earnings for 2001 by the number of weeks elapsed from January 1, 2001 to August 16, 2001. Healy Tibbitts’s Br. at 16-24. Healy Tibbitts acknowledges that section 10(b) is not the appropriate method because there is no evidence of the required “similar worker” wages and posits that the Claimants’ failure to introduce such evidence should be interpreted as an admission that the Decedent’s work was not “permanent” in nature.

Healy Tibbitts submits that section 10(c) affords broad discretion to consider historical earnings, see *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991), and that the Decedent’s income tax returns for years 1997-2000 show businesses losses in each of those years.

Healy Tibbitts contends that the Claimants have failed to meet their burden of establishing by a preponderance of the evidence that the Decedent's future earnings would have continued at the rate he earned with Mannering. It asserts that the testimony of Darlette Maumau and Maika Mataele is too speculative to show that the Decedent would have continued to receive earnings at that rate paid by Mannering, and it argues that the Decedent's comments to his wife that he expected lengthy employment does not amount to substantial evidence. Healy Tibbitts points out that Mannering had no future jobs for the Decedent at the time of the accident, and it notes the Mataele brothers' bids on future projects have not produced any work. Despite testimony that he had a standing offer of employment with Okada Trucking, Healy Tibbitts contends that the Decedent never accepted that offer, but rather was laid off from Okada in 1995 or 1996 and was thereafter self-employed until starting work for Mannering. Healy Tibbitts similarly contends that Mr. Mataele's testimony that the Decedent would have been employed through the union is too speculative to be relied upon for an average weekly wage determination.

Section 10 of the Act provides three alternative methods for determining an injured worker's average annual earnings, which are then divided by 52, pursuant to section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing an injured worker's earning power at the time of injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp. of Baltimore*, 24 BRBS 137 (1990); *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978); *Barber v. Tri-State Terminals*, 3 BRBS 244 (1976), *aff'd sub nom Tri-State Terminals v. Jesse*, 596 F.2d 752, (7th Cir. 1979). The determination of an employee's annual earnings must be based on substantial evidence. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991). The party contending that actual wages are not representative bears the burden of producing supporting evidence. *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176 (9th Cir. 1976); *Riddle v. Smith & Kelly Co.*, 13 BRBS 416, 418 (1981). The claimant's testimony may be considered substantial evidence. *Carle v. Georgetown Builders*, 14 BRBS 45, 51 (1980); *Smith v. Terminal Stevedores*, 11 BRBS 635, 638 (1979). *Cf. Mattera v. M/V Mary Antoinette, Pac. King, Inc.*, 20 BRBS 43, 45 (1987) (ALJ rejected claimant's testimony due to his lack of credibility).

Section 10(a) applies only if the employee "worked in the employment in which he was working at the time of the injury whether for the same or another employer, during substantially the whole of the year immediately preceding" the injury. 33 U.S.C. § 910(a); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821 (5th Cir. 1991); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 135-36 (1990). Section 10(a) is not applicable where the injured worker was self-employed in the year prior to the injury. *Roundtree v. Newpark Shipbuilding & Repair*, 13 BRBS 862, 867 n.6 (1981), *rev'd*, 698 F.2d 743 (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.), *cert. denied*, 469 U.S. 818 (1984).⁹ The

⁹ The original panel decision reversing the Board's holding in *Roundtree* subsequently overruled by an *en banc* decision of the Fifth Circuit because the appeal was interlocutory. The Board has noted that the overruled panel decision in *Roundtree* is not binding precedent and that

evidence shows that the Decedent worked for Mannering for 15 weeks prior to his fatal accident and that he was self-employed for the remainder of the year prior to his accident. On these facts, I find that section 10(a) is inapplicable because the Decedent only worked in the employment in which he was injured for 15 weeks which is clearly not “substantially the whole of the year immediately preceding” the injury.

Where section 10(a) is inapplicable, section 10(b) must be considered before resorting to application of section 10(c). *Palacios v. Campbell Indus.*, 633 F.2d 840, 842-843 (9th Cir. 1980). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" within the meaning of section 10(a) prior to his injury. *Gatlin*, 936 F.2d at 821; *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1342 (9th Cir. 1982), *vac'd in part on other grounds*, 462 U.S. 1101 (1983). In addition, section 10(b) looks to the wages of other workers in the same employment situation and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole year preceding the injury, in the same or similar employment, in the same or neighboring place. 33 U.S.C. § 910(b). Accordingly, the record must contain evidence of the substitute employee's wages. *Palacios*, 633 F.2d at 842-843. *See also Bury v. Joseph Smith & Sons*, 13 BRBS 694, 696-98 (1981) (section 10(b) does not apply where no similar employees worked substantially entire year prior to injury). Although Maika and Sam Mataele would appear similarly situated to the Decedent for purposes of a section 10(b) earnings calculation, the record contains no evidence of their earnings. Therefore, I find, as Healy Tibbitts concedes, that section 10(b) is inapplicable because the record contains no evidence of the actual wages of employees with the Decedent's similar qualifications and employment circumstances. *Duncanson-Harrelson Co.*, 686 F.2d at 1341-42; *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990)); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339, 344-45 (1988). Accordingly, I must resort to section 10(c) to determine the Decedent's average weekly wage.

Under section 10(c), the relevant factors are (1) the previous earnings of the injured employee in the employment in which he was working at the time of the injury, (2) the previous earnings of similar employees in the same class and (3) other employment of the injured worker, including self-employment. 33 U.S.C. §910(c). In applying section 10(c), the objective is to reach a fair and reasonable approximation of the injured worker's annual wage-earning capacity at the time of the injury. *Gatlin*, 936 F.2d at 823; *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). That amount is then divided by 52, in accordance with section 10(d), to arrive at the average weekly wage. Section 10(c) determinations will be affirmed if they reflect a reasonable representation of earning capacity and the claimant has failed to establish the basis for a higher award. *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855, 859 (1982).

“Earning capacity” for purposes of section 10(c) is defined as "ability,

the Board's 1981 *Roundtree* decision remains good law. *Mijangos v. Avondale Shipyards*, 19 BRBS 15, 20 n.2 (1986)

willingness, and opportunity to work" or "the amount of earnings the claimant would have the potential and opportunity to earn absent injury." *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS

410, 413 (1980). Unlike sections 10(a) and (b), subsection (c) contains no requirement that the previous earnings considered be within the year immediately preceding the injury. *Gatlin*, 936 F.2d at 823. It would be unfair to look only at the one year preceding the injury when the work is slow

one year and then busy the next, or vice versa. *Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 321 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987). Consideration of the probable future earnings of the claimant is appropriate in extraordinary circumstances, where previous earnings do not realistically reflect wage-earning potential. *Walker*, 793 F.2d at 321 (rejecting argument that average weekly wage should be derived from similar employee wages at time of hearing, not claimant's wages at time of accident where higher wages based on merely inflation and typical raises). The Board has allowed the consideration of probable future earnings where the injured worker was involved in seasonal employment and there was evidence of opportunities of increased work in the future. *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182, 187 (1984) (rejecting use of claimant's age and retirement plans in average weekly wage calculation); *Barber v. Tri-State Terminals*, 3 BRBS 244, 250 (1976) (holding average weekly wage calculation for seasonal worker should have been based on possible future earnings where evidence showed port business increased each of four years, similar workers earned substantially more in subsequent year, and claimant was dependable and worked whenever called), *aff'd sub nom. Tri-State Terminals v. Jesse*, 596 F.2d 752 (7th Cir. 1979).

The Claimant relies on *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1291-1292 (9th Cir. 1979), in which the Ninth Circuit upheld an average weekly wage calculated pursuant to section 10(c) that was based on higher wages earned during a 10-week period of employment, where there was nothing to demonstrate that the ALJ did not consider evidence of both the earnings of employment in which the injury occurred and other employment of the injured worker. The Court held that the ALJ was not required to base the calculation on previous, lower-paid employment where it was possible to draw an inference that the worker would have continued to earn the higher wage if not for the injury. 600 F.2d at 1293. Additionally, the Claimant cites *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981), in which the Board remanded the matter for reconsideration in light of *Bonner* because the ALJ had calculated the average weekly wage by dividing the total earnings for the preceding year by the number of weeks worked (42), and there was evidence that the employee had increased wages for the seven to eight-week period at the employment in which he was injured. *Miranda*, 13 BRBS at 883, 886. The Board directed the ALJ "to consider the earnings of the claimant for the seven or eight weeks which he worked for employer and to recompute the average weekly wage in conformity with this opinion." *Id.* at 886.

The record contains evidence relating to two of the factors that must be considered in calculating an average weekly wage pursuant to section 10(c): (1) the Decedent's earnings in the employment in which he was injured and (2) the Decedent's earnings in other employment. As discussed above, the parties offered no evidence of the actual wages of similar workers so this

third factor cannot be considered in calculating the Decedent's average weekly wage. The record evidence shows that, just before starting employment on the P-123 Berthing Wharves Project for Mannering, the Decedent joined the operating engineers' union. He worked on the project for 15 weeks before his fatal accident, and the other Mannering employees continued to work on the project for about another month. The evidence also shows that the Decedent had operated cranes during his employment with Okada Trucking which ended around 1995 or 1996 and that he was essentially self-employed from 1997 to 2000 with no reported income from this employment.

The record also includes evidence regarding the Decedent's probable future employment with the operating engineers' union. At the hearing, John Mannering testified that the Decedent was required to join the operating engineers' union in order to work on the berthing wharves project and would have been eligible for additional work out of the union's hiring hall after the project's completion. TR 147-149. He also stated that he never had any disciplinary problems with the Decedent and would have had no problem rehiring him. In addition, Maika Mataele, a current member of the operating engineers' union, testified that someone with the Decedent's significant marketable skills, particularly his experience operating cranes, would be able to receive regular work through the union.¹⁰ He stated that even though the Decedent had been in his one-year probationary period at the time of his accident, the Decedent was current with his union dues and responsibilities and the union did not assign work based on seniority. Both Mr. Mataele and the Decedent's widow testified that the Decedent considered the union membership to represent long-term employment, which would enable him to continue to work as a machine operator either through the union or with his previous employers, Okada Trucking and Radian, both of which had extended job offers contingent on union membership.

Based on the uncontradicted evidence that the Decedent had the "ability, willingness, and opportunity to work" on a regular basis through the union's hiring hall, I find that the Decedent's average weekly wage should be calculated based on the employment in which he was working at the time of his fatal accident taking into account the four weeks that the Mannering employees continued to work on the berthing wharves project. I base this finding primarily on the testimony elicited from Maika Mataele, who I found to be a particularly credible witness, concerning the Decedent's ability to obtain future work through the union, and I find it significant that his testimony in this regard was substantially corroborated by John Mannering. While I agree with the Employers that the evidence is too speculative to support a finding that the Decedent would have found additional work for Mannering after completion of the berthing wharves project or with the Mataele brothers on other projects such as the dredging job at the

¹⁰ Healy Tibbitts argues that the evidence does not show that the Decedent could have received regular work through the union because Mr. Mataele was not performing union work, but rather lower-paid concrete work, at the time of the hearing. I note, however, that Mr. Mataele testified at the hearing that he was choosing to perform concrete work in a lower paid position, while keeping his union membership active, because this would be beneficial in enabling him to open up his own business in the future. TR 185-186.

Kanioli Marine Corps Air Station, I find that the evidence does establish that it is more likely than not the Decedent would have continued to perform regular work through the operating engineers' union at the rate he was earning at the time he was fatally injured while working for Mannering. Accordingly, I will calculate the Decedent's average weekly wage by adding \$17,501.76 (the amount the Decedent earned while employed at Mannering) and \$4,667.14 (the additional amount that the Decedent would have earned on the Project had the fatal injury not occurred), which totals \$22,168.90, and then divide this sum by 19 weeks (the total number of weeks the Decedent would have worked on the Mannering Project had the injury not occurred), resulting in an average weekly wage of: \$1,166.78.

D. The Amount of Benefits Due

The parties stipulated that the Claimant, Darlette Maumau, is the eligible surviving spouse of the Decedent and that Salesi and Maika Maumau are the natural children of the Decedent. TR 12-13. The Claimant, Darlette Maumau, introduced funeral bills totaling between \$8,000 and \$9,000. CX 18. Pursuant to section 9(a) of the Act, I find that she is entitled to an award of funeral expenses in the maximum allowable amount of \$3,000.00. I further conclude that the Claimant, Darlette Maumau, is entitled to widow's compensation pursuant to section 9(b) of the Act based on the Decedent's average weekly wage of \$1,166.78 beginning on August 17, 2001, and that the Claimant, Shelly Daggett, is entitled to survivor's benefits pursuant to section 9(b) of the Act based on the Decedent's average weekly wage of \$1,166.78 on behalf of the Decedent's minor children beginning on August 17, 2001.

E. Interest

Although not specifically authorized in the Act, the Benefits Review Board and the Courts have consistently upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228-30 (5th Cir.1971); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *rehearing denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); *Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989). Interest is due on all unpaid compensation including funeral expenses; *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989); but interest is not payable on the penalty assessed pursuant to section 14(e). *Cox v. Army Times Publishing Co.*, 19 BRBS 195, 198 (1987).

The Board has also concluded that inflationary trends in the economy have rendered a fixed interest percentage rate no longer appropriate to further the purpose of making claimant whole, and it has held that "the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982)" which is the rate periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1,

1982. My order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

F. Attorney's Fees

Having successfully established their right to compensation benefits, the Claimants are entitled to an award of attorneys' fees under section 28(a) of the Act. *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097 (9th Cir. 1982). In my order, I will allow the Claimants' attorneys 30 days from the date this Decision and Order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. §702.132, and the Employer will be granted 15 days from the filing of the fee petition to file any objection.

VI. Order

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following compensation order is entered:

It is therefore **ORDERED** that:

1. The Employer, Healy Tibbitts Builders, shall pay to the Claimant, Darlette Maumau, funeral expenses in the maximum allowable amount of \$3,000.00 pursuant to 33 U.S.C. §909(a), and widow's compensation benefits pursuant to 33 U.S.C. §909(b) based on an average weekly wage of \$1,166.78, plus the applicable annual adjustments provided in 33 U.S.C. §910(f), beginning on August 17, 2001.
2. The Employer, Healy Tibbitts Builders, shall pay to the Claimant, Shelly Daggett, on behalf of the Decedent's minor children, Salesi and Maika Maumau, survivor's compensation benefits pursuant to 33 U.S.C. §909(b) based on an average weekly wage of \$1,166.78, plus the applicable annual adjustments provided in 33 U.S.C. §910(f), beginning on August 17, 2001.
3. The Employer, Healy Tibbitts Builders, shall pay to the Claimants, Darlette Maumau and Shelly Daggett, interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. §1961 (1982).
4. The Claimants' attorneys shall file, within thirty (30) days of receipt of the filing of this Decision and Order in the office of the District Director, fully supported and fully itemized fee petitions, sending copies thereof to counsel for the Employer who shall then have fifteen (15) days to file any objections; and
5. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts
DFS:dmd